

No. 83-998

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In the Supreme Court of the United States

OCTOBER TERM, 1983

FOLEY CONSTRUCTION COMPANY, PETITIONER

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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Petitioner, the prevailing party in a disappointed bidder's suit against the United States Army Corps of Engineers, contends that the courts below erred in denying its application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412, on the ground that the government's position in litigation was "substantially justified."

1. On November 10, 1981, the Army Corps of Engineers invited bids for construction of a levee along the Mississippi River in Burlington, Iowa. The bid invitation was issued pursuant to the Small Business Administration set-aside program, a program that encourages small firms to bid for federal contracts (see 10 U.S.C. 2301(b)). Herbison Construction Company was the low bidder, and petitioner was the second lowest bidder. Pet. App. 2-3, 35-36.

Petitioner filed a protest with the Corps' contracting officer, alleging that Herbison did not qualify as a small business. Pursuant to regulations, the contracting officer forwarded the protest to the SBA district office and suspended action on the contract. On February 22, 1982, the SBA district office ruled that Herbison was in fact a small business. On February 23, 1982, the day on which Herbison's bid would have expired if not accepted, the Corps awarded the contract to Herbison. Hours after the award, petitioner informed the Corps that it intended to appeal the decision of the SBA district office to the SBA Size Appeal Board in Washington, D.C. Pet. App. 3, 36-39.

On March 10, 1982, petitioner filed this action in the United States District Court for the Southern District of Iowa, seeking to enjoin the Corps and Herbison from proceeding under the contract. The Corps resisted the granting of injunctive relief on the ground that there was no likelihood of success on the merits since the contract had been awarded pursuant to valid procurement regulations.¹ The Corps also contended that under the Eighth Circuit's decision in *Iconco v. Jensen Construction Co.*, 622 F.2d 1291 (1980), petitioner had an adequate remedy at law in the form of a suit against Herbison for unjust enrichment and fraud in the event Herbison was determined not to be a small business. The district court nevertheless entered a temporary restraining order and, subsequently, a preliminary injunction barring the Corps from proceeding with the contract. Pet. App. 3-4, 39-40.

¹Both Army Procurement Regulations and Federal Procurement Regulations provide that if an award is made prior to the time the contracting officer receives notice of an appeal, "the contract awarded shall be presumed to be valid." 41 C.F.R. 1-1.703-2(d); 32 C.F.R. 1-703(b)(3).

On April 22, 1982, the SBA Size Appeal Board overruled the District Director and declared that Herbison did not qualify as a small business (Pet. App. 40). On May 7, 1982, the district court entered a permanent injunction against the Corps, ruling that the award of the contract to Herbison without waiting for an SBA Size Appeal Board determination constituted "clear illegality" (*id.* at 43-62). In an unprecedented step, the district court ordered the contract awarded to petitioner (*id.* at 67-68).²

2. Petitioner sought an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d). The district court denied the application, concluding that while the Corps had not prevailed in the lawsuit, its positions in the litigation had been "substantially justified" and, accordingly, no fees could be awarded under the Act (Pet. App. 31-34).

The court of appeals affirmed (Pet. App. 1-22). After noting (*id.* at 5) the purposes underlying enactment of the Equal Access to Justice Act, the court of appeals also acknowledged (Pet. App. 13) "the interest of the government and the public in a procurement process unfettered by delay." The court then found (*id.* at 14-19) that the Corps had acted reasonably in, *inter alia*, defending its initial award of the contract to Herbison and proceeding with the contract after it received notice that petitioner intended to appeal the decision of the SBA district office (see note 1, *supra*). The court of appeals concluded (Pet. App. 21) that "this is not the type of case to which the EAJA was intended to apply; there was no unreasonable government action involved."

²Because the time that would have been consumed by an appeal would have postponed construction of the much needed levee, the government determined not to appeal the district court's judgment.

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

As petitioner acknowledges (Pet. 15-16, quoting S. Rep. 96-253, 96th Cong., 1st Sess. 6 (1979), and H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980)), "[t]he test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis in law and fact, no award will be made." The positions taken by the government in this case were all eminently reasonable. First, as the court of appeals held (Pet. App. 14-19), the Corps acted reasonably in relying on Federal Procurement Regulations and Armed Services Procurement Regulations for the proposition that, if an award is made after the SBA district office rules, but prior to the time the contracting officer receives notice of an appeal, "the contract shall be presumed to be valid." 41 C.F.R. 1-1.703-2(d); 32 C.F.R. 1-703(b)(3). Furthermore, a validly awarded contract that was advertised as a small business set-aside is not void merely because the company awarded the contract subsequently is determined by the Size Appeal Board not to qualify as a small business. *Allen M. Campbell Co. v. United States*, 467 F.2d 931 (Ct. Cl. 1972); *Mid-West Construction, Ltd. v. United States*, 387 F.2d 957, 959 (Ct. Cl. 1968). The Corps therefore was entirely justified in arguing that the district court should not grant equitable relief to petitioner because there had been no "clear illegality" in the award of the contract.

The Corps also was justified in arguing that petitioner was not entitled to equitable relief. Petitioner had an adequate remedy at law in the form of a suit against Herbison for unjust enrichment and fraud, see *Iconco v. Jensen Construction Co.*, *supra*, as well as a suit against the United States for bid preparation costs. *Cincinnati Electronics*

Corp. v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975); see also *Lincoln Services, Ltd. v. United States*, 678 F.2d 157, 158 (Ct. Cl. 1982). It therefore was reasonable for the Corps to assert that petitioner had not suffered irreparable harm, a prerequisite for injunctive relief.

Finally, the Corps was justified in resisting entry of a court order requiring award of the contract to Herbison. The overwhelming body of federal case law supports the position that even in the presence of "clear illegality" a company has no right to a federal contract. See, e.g., *Sea-Land Service, Inc. v. Brown*, 600 F.2d 429, 432-433 (3d Cir. 1979); *Cincinnati Electronics Corp. v. Kleppe*, 509 F.2d at 1089; *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

Reduced to its essence, petitioner's contention is nothing more than an assertion that because the Corps did not prevail on the merits of the case, its position must have been unreasonable. Congress made clear, however, that "[t]he standard * * * should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." H.R. Rep. 96-1418, *supra*, at 11; S. Rep. 96-253, *supra*, at 7.³

³Petitioner also raises as a question presented for review (Pet. 3) whether it was deprived of due process and equal protection "where it was denied an opportunity to appeal the Small Business Administration District Director's 'size determination' because the Corps of Engineers prematurely awarded a government construction contract prior to [petitioner's] receipt of the District Director's decision." But this question is not properly before the Court, since petitioner not only did appeal the decision of the District Director, but prevailed and ultimately was awarded the contract at issue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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